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No. 06-972

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In the

Supreme Court of the United States

JOHN M. GIOVANELLA,

Petitioner,

v.

TOWN OF ASHLAND CONSERVATION COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

John Giovanella owned two pieces of property in Ashland, Massachusetts. One is a vacant lot, and one is a lot with a home on it. The lots are separately divided, independently useful, assessed separately for tax purposes, and have different addresses, but are next door to each other. The Town of Ashland has denied all economically beneficial uses of the vacant lot to preserve it in a natural state. The question presented is:

Whether it is appropriate, in regulatory takings analysis to combine a legally separate and independently economically viable lot with a previously developed lot, because the lots happen to be contiguous and owned by the same person, and to thereby defeat a claim that the government has taken one of the lots?

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I

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Town of Ashland's Brief in Response to Petition (Response) does not dispute that the decision below raises an important issue of constitutional law concerning whether to aggregate a takings claimant's legally and developmentally distinct parcel with another commonly owned parcel to find the correct unit of property for takings analysis. Instead, the Response suggests it is unnecessary to tackle this important issue now because the Court's jurisprudence provides enough guidance and there is no real conflict below because courts generally use a standardless ad-hoc approach. Secondarily, the Town suggests this is not a good vehicle to address the issue. None of these points are valid.

ARGUMENT

I

THE ISSUE OF WHETHER AND ON WHAT BASIS TO COMBINE A TAKINGS CLAIMANT'S COMMONLY OWNED PARCELS TO CREATE ONE TAKINGS UNIT IS UNSETTLED

From its inception, this Court's regulatory takings doctrine has been plagued by an inability to determine the unit of property subject to takings tests when there are multiple parcels of land. Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 Envtl. L. 175, 176 n.3 (2004) (The relevant parcel "has been a conceptual difficulty since the birth of regulatory takings in 1922 and has remained

intractable through the [Supreme] Court's most recent decisions in *Palazzolo* and *Tahoe-Sierra*."). The only direction on this issue is the Court's admonition that courts consider "the parcel as whole." But this concept is too vague to determine the boundaries of the property subject to takings analysis ("the parcel as a whole") when the claimant owns multiple parcels of land, some of which are not burdened by the challenged regulation. *See Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 497 (1982) ("the [Supreme] court's broad [parcel as a whole] language does not resolve the question presented here" as to whether to aggregate "contiguous property for which different zoning designations were adopted").

Even the Town, which initially casts the "parcel as a whole" concept as a sufficient standard, agrees that "[t]he Court's reference to the 'parcel as a whole' and the 'property in its entirety' does not . . . resolve the specific factual inquiry regarding what constitutes the whole parcel or entire property." Response at 7.

It is this "specific" question—how to find the particular "whole parcel" or "property in its entirety" for takings scrutiny when the property owner/claimant owns multiple parcels—that is critical to the Court's regulatory takings doctrine. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180 (Fed. Cir. 1994) ("[T]he question of whether there has been a partial or total loss of economic use (in the latter case a 'categorical' taking) . . . depends on what is the specific property that was affected by the permit denial."); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998,1007 (Ohio 2002) ("Determining the relevant parcel of the takings fraction is critical because it usually determines the applicable takings test."). Without a method for identifying the area of property subject to takings analysis, existing takings test are more of a rhetorical aspiration than a constitutional rule. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992).

Notwithstanding its importance, this Court has never directly considered the proper approach to finding the relevant takings parcel when there are multiple land parcels. *See id.*; Michael C. Blumm, *Palazzolo and the Decline of Justice Scalia's Categorical Takings Doctrine*, 30 B.C. Envtl. Aff. L. Rev. 137, 147 (2002) ("The size of the property under consideration, also known as the 'denominator issue,' is the key remaining unresolved issue in takings jurisprudence."). Perhaps one can find a few clues in current case law as to the direction the Court might go when it finally addresses the question of the relevant takings parcel, *see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331-32 (2002) (stating in dicta that "[a]n interest in property is defined by the metes and bounds that describe its geographic dimensions"). But none of this can be confused with an intelligible and predictable set of rules. Certainly, the Court has never indicated—even in dicta—that standards for takings liability in some cases—economic impact, reasonable expectations, and the character of regulation—also define the property interest to which those standards apply, as the Town suggests. Response at 7-8.

At present, lower courts have only the "parcel as a whole," a concept whose indeterminancy has driven the courts to concoct their own criteria for determining whether parcels should be aggregated to find the relevant takings parcel. *See, e.g, R.T.G., Inc.*, 780 N.E.2d at 10-11. Thus, the well-established view of the legal community, including the court below, *see* Petitioner's Appendix at A-9, is that this Court's precedent is inadequate to resolve the issue of when a claimant's regulated land interests should be subject to takings analysis without respect to other holdings. *See* Wright, *supra*, at 191 ("[T]he Court's current rule, if we could call it that, is both vague and unhelpful" as it has not "explained the parameters of the [parcel as a whole] rule."). Only direct

scrutiny of the issue will bring the clarity needed in this important area of takings law.

II

THE LOWER COURTS ARE IN CONFLICT ON THE CRITERIA THAT DRIVE THE DETERMINATION OF THE RELEVANT TAKINGS PARCEL

The Town recognizes "the varying outcomes that [lower] courts have reached regarding whether to aggregate contiguous, commonly owned parcels of land," Response at 4, but claims the courts are not really in conflict because they apply a fact specific approach. But the very reason there are "varying outcomes" below is because courts, lacking any intelligible standards, cannot agree on *what type of facts* support the aggregation of commonly owned parcels.

Like the Supreme Judicial Court of Massachusetts, some courts find contiguity to be especially important and to presumptively warrant aggregation of a takings claimant's land holdings. Many of these courts also stress the landowner's treatment of his land. *See District Intown Properties v. District of Columbia*, 198 F.3d 874, 880-81 (D.C. Cir. 1999).[1] But other courts focus on the objective legal and economic characteristics of the restricted parcel in considering whether to

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[1] The Town claims the D.C. Circuit's *District Intown* decision articulated a multi-factor approach like that of some other courts, yet does not deny that *District Intown* decided the relevant parcel issue in favor of aggregation because the parcels "were spatially and functionally contiguous and had been treated by plaintiff as a single indivisible property for more than 25 years." Response at 12. In so doing, *District Intown* is in conflict with decisions from the Federal Circuit and Ninth Circuit that give little weight to contiguity and subjective landowner treatment and instead define the relevant parcel based on legal and economic features of the owner's property. *See* Petition at 15-16.

combine it with other property. *See American Savings and Loan Association v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981) (rejecting "physical contiguity" in favor of inquiry into whether the parcels that are independently economically viable and subject to different zoning).

Unfortunately, in its zeal to deny any federal conflict, the Town badly misrepresents the Ninth Circuit's *American Savings* decision, claiming it looked to "physical contiguity; unity of ownership; and unity of use" to find the relevant parcel. Response at 13. In fact, American Savings explicitly *rejected* this inquiry in regulatory takings cases. 653 F.3d at 369. Conversely, the D.C. Circuit squarely *applied* the physical contiguity and unity of ownership approach rejected by *American Savings* in the *District Intown* case, *see* 198 F.3d at 880, thus putting the D.C. Circuit in manifest tension with the Ninth Circuit.

Thus, whether or not courts can be generally said to favor a "factual" inquiry, their actual approach to deciding the relevant parcel is fundamentally inconsistent; some rule primarily by reference to the legal and regulatory status of the claimant's parcels, and independent economic viability, others rely on contiguity and landowner intentions. Still other courts purport to consider all these factors, in a rudderless balancing inquiry. Lower courts are thus similar only in their lack of a guiding framework.

There is a real conflict as to the appropriate standards and their weight on the issue of whether a takings claimant's regulated property stands alone or is to be combined with a larger area of land for takings analysis. This type of confusion has always been worthy of this Court's attention. *See, e.g. Dolan v. City of Tigard*, 512 U.S. 374, 377, 389-90 (1994) (granting certiorari to address the issue of "the required degree of connection between the exactions imposed by the city and

the projected impacts of the proposed development," on which state courts disagreed).

III

THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE FACTORS THAT DEFINE THE RELEVANT (WHOLE) PARCEL

In asking the Court to resolve the conflict and confusion on the relevant parcel issue, Petitioner John Giovanella (Giovanella) is not asking the Court to "reconsider" any of its prior takings decisions; after all, as the first section shows, no prior decision considered the issue here. Nor does he seek to abrogate the "parcel as a whole" concept. Petitioner is simply requesting instruction on *the reach* of that concept; he is asking the Court to identify the specific criteria that determine whether a parcel subject to a challenged regulation should be combined with a commonly owned parcel for takings analysis. Even more precisely, he is asking whether a legally separate and independently economically viable parcel can be combined with a similar parcel under common ownership to create a large takings unit that dilutes the force of a takings claim.

Contrary to the Town's claims, Giovanella has not advocated a per se rule categorically defining the relevant takings parcel as the parcel subject to the challenged regulation. Giovanella's position is that courts should weigh the economic viability of the restricted parcel, *see, e.g., City of Coeur D'Alene v. Simpson*, 136 P.3d 310, 323 (Idaho 2006) ("The economic independence test accounts for the very factors by which property is defined, at least in the takings context: use, economics, and regulation. We believe it is a fair and accurate factor"), and its legal identity. *Lucas*, 505 U.S. at 1016 n.7 (suggesting in dicta that relevant parcel may be defined by "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or

elimination of) value"); *Simpson*, 136 P.3d at 323 (separate taxation status is important). If these factors indicate that the regulated parcel is independent from other commonly owned parcels, the presumption should be that it is a separate unit for takings analysis and not to be combined with the claimant's other parcels, whether contiguous or not.

This case is an appropriate vehicle for reviewing these issues and arguments. The decision below plainly and exhaustively addressed the issue of whether and on what basis to aggregate Giovanella's legally distinct parcels, and opted to adopt a novel presumption of law that contiguous parcels are one. There are no procedural issues that might complicate the ability of the Court to reach the merits of the relevant land parcel issue. Finally, the timing is right; lower courts have struggled with the issue for decades without this Court's input and without consensus.

There is nothing to the Town's argument that this case is less than ideal because there is no taking even if the Court considers Giovanella's regulated lot, rather than his combined lots, to be the proper unit of analysis. The lower court's decision to aggregate Giovanella's legally and developmentally independent lots (one of which was developed long ago) drastically reduced the economic impact of the Town's actions —the central question of regulatory takings analysis—and thereby skewed the outcome against a taking. In fact, the court below believed its combination of Giovanella's parcels *entirely defeated* the Town's liability for a per se taking. Petitioner's Appendix at A-17. The court's economic impact analysis would have to change if Giovanella's valueless parcel were alone defined as the correct relevant parcel, and the likelihood of liability would necessarily increase.[2] Thus, the relevant

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[2] Petitioner notes that this Court need not necessarily reach the ultimate issue of the Town's liability. If the Court adopts standards

(continued...)

parcel issue here is not academic; it has significant implications for Giovanella's constitutional rights and the rights of similar property owners.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

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Respectfully submitted,

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[2] (...continued)
for determining the relevant parcel that differ from the lower court, and these suggest that Giovanella's valueless lot is alone the appropriate property unit, the Court can remand the case to the Supreme Judicial Court of Massachusetts for revised takings analysis.